

OECD MULTINATIONAL ENTERPRISES GUIDELINES AND THEIR ENFORCEMENT MECHANISM

IVAN CISÁR

Masaryk University, Faculty of Law

Abstract in original language

OECD has been promoting the MNE Guidelines for several decades as a code of conduct for the companies seated in its member states. The Guidelines have been drafted as a recommendation for the enterprises. But for approximately a decade the enforcement mechanism through National Contact Points have been created to deal with the complaints against the enterprises. Does this system change the recommendation to the somehow binding source of law? The character of the Guidelines was also addressed by the organs of UN in the connection with the activities of the enterprises in the Great Lakes region in Africa. Moreover, the recent developments connected with the revision of the MNE Guidelines are addressing this character.

Key words in original language

OECD Multinational Enterprises Guidelines, National Contact Point,
specific instance

INTRODUCTION

Corporations operating in various parts of world are the vital for the development of the international economic system. They serve as an important mean of bringing the economic development to the underdeveloped regions of the world.

The other side of their activities are the possible undesired side effects on the local communities via harming the environment, setting the low level for the working conditions or undue influence on the working of the government (bribery, ...).

To overcome these externalities the concept of the corporate social responsibility has been evolving. Its aim is to uphold e.g. the rights of the employees, the health and safety conditions, the safety of operations and the protection of the environment and/or the transparency of the conducting the business. The range of instruments falling under this concept is immense. It can range from the voluntary codes of conduct endorsed individually by the companies themselves, through the agreements concluded between the company and its stakeholders (e.g. the international framework agreements concluded between the enterprises and the trade unions and their

federations), to the code of conducts promoted together by the companies and the NGOs and ending in the government backed codes.¹

One of the most influential codes of business ethics and rules of corporate responsibility for the companies operating in various jurisdictions are the Multinational Enterprises Guidelines backed by the Organisation for the Economic Cooperation and Development (referred as 'MNE Guidelines'). The reasoning behind their adoption is the recognition that "socially and environmentally sustainable markets and enterprises require principles and standards for responsible business conduct".²

This paper is not dealing with the concept of the corporate social responsibility and its usefulness. But its aim is to point to the changes of the character of the MNE Guidelines changing them from the voluntary code of conduct which the companies are encourage to adopt to the code of behaviour that the companies shall observe under the threat of various sanctions. The simple fact of creating the binding rules on corporate behaviour itself is not negative one. But the way of doing it through the "back doors" is undermining the principle of legal certainty and predictability of the consequences for the companies.

BACKGROUND OF THE MNE GUIDELINES

MNE Guidelines are in here for 25 years. They were adopted as a part of the whole package of the Declaration on International Investment and Multinational Enterprises³ in 1976. This is a broad political commitment adopted by the governments of the OECD Member States to promote direct investment among them.⁴ Today, all 34 Member States to the OECD with 8 more countries have subscribed to the Declaration on the International

¹ The various approaches to the CSR with several examples can be found summaries in the Green Paper – Promoting a European framework for corporate social responsibility published by the European Commission (COM(2001)0366 final).

² RUGGIE, J. Discussion Paper on updating the OECD Guidelines for Multinational Enterprises. 10th OECD Roundtable on Corporate Responsibility [online]. Paris: OECD, 2010 [cit. 2011-05-15]. Available at: <<http://www.oecd.org/dataoecd/17/35/45545887.pdf>>. § 1.

³ OECD Declaration and Decisions on International Investment and Multinational Enterprises [online]. Paris: OECD, [cit. 2011-05-15]. Available at: <www.oecd.org/daf/investment/declaration>.

⁴ The OECD Guidelines for Multinational Enterprises: Frequently Asked Questions [online]. Paris: OECD, [cit. 2011-05-15]. Available at: <http://www.oecd.org/document/58/0,3746,en_2649_34889_2349370_1_1_1_1,00.html>.

Investment and Multinational Enterprises and with it also to the MNE Guidelines as its integral part.⁵

The text of the MNE Guidelines (and also other parts of the Declaration) is not static. Every part of the Declaration is subject to periodical review.⁶ The reviews were conducted in 1979, 1982, 1984, 1991 and 2000.⁷ The last review process is currently under its way⁸ and it should be concluded just shortly after this paper is submitted at the 50th anniversary Ministerial Council Meeting 2011 on 25 – 26 May 2011.⁹

IMPLEMENTATION OF THE MNE GUIDELINES

The MNE Guidelines are unique by the additional level attached to the ethical code for the enterprises.¹⁰ The OECD Member States agreed on creation of the implementation mechanism that should ensure the effectiveness of the MNE Guidelines.

As an integral part of the MNE Guidelines review in 2000, the new Decision of the OECD Council was adopted.¹¹ The member states of the OECD and other adhering countries have decided to set up the governmental organs – the national contact points. This decision is binding the on the members states as any other decision of the OECD Council.¹²

The effectiveness of the MNE Guidelines should be ensured by the governmental offices – the National Contact Points. These offices should promote the MNE Guidelines, and what is more important, handle inquiries

⁵ OECD Declaration and Decisions on International Investment and Multinational Enterprises [online]. Paris: OECD, [cit. 2011-05-15]. Available at: <www.oecd.org/daf/investment/declaration>.

⁶ Declaration on International Investment and Multinational Enterprises. In The OECD Declaration and Decisions on International Investment and Multinational Enterprises: basic Texts. DAF/IME(2000)20. Point VI.

⁷ The OECD Declaration and Decisions on International Investment and Multinational Enterprises: basic Texts. DAF/IME(2000)20. p. 2

⁸ Updating the OECD Guidelines for Multinational Enterprises [online]. Paris: OECD, 29 April 2011 [cit. 2011-05-15]. Available at: <http://www.oecd.org/document/33/0,3746,en_2649_34889_44086753_1_1_1_1,00.html>.

⁹ The 50th anniversary Ministerial Council Meeting 2011[online]. Available at: <www.oecd.org/mcm2011>.

¹⁰ Terms of Reference for an update of the Guidelines [online]. Paris: OECD, 30 April 2010. Available at: <<http://www.oecd.org/dataoecd/61/41/45124171.pdf>>. p. 5.

¹¹ Decision of the Council on the OECD Guidelines for Multinational Enterprises, 27 June 2000, C(2000)96/FINAL.

¹² Convention on the Organisation for Economic Co-operation and Development. Art. 5, letter (a) with Art. 7.

and promote discussions with the concerned parties to help solving problems arising with the application of the MNE Guidelines.¹³

There is no specific requirement to the composition of the NCPs.¹⁴ It is up to the each government to choose the best organization addressing the needs of each country. So the actual composition of the NCP can vary from the single official (like in the Czech Republic) to the complex mixed office of the several concerned governmental offices or agencies supervised by the independent body (like in the United Kingdom).

The functions of NCPs are various. But as I already stated, the most important function connected with the character of the MNE Guidelines is the handling of specific instances. NCPs should “contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances”.¹⁵

Consequently, members of the business community, employee organizations and other concerned parties may raise any issue connected with the MNE Guidelines.¹⁶ Mostly, this will be raised by the stakeholders – the NGOs looking after the protection of the environment or trade unions protecting its members – the employees of the enterprises, affected by the activities of the enterprises. But in general, everybody can 'implicate' any company with an allegations about the company's misconduct.

THE CHARACTER OF MNE GUIDELINES

WHAT ARE THEY TELLING FORMALLY?

The MNE Guidelines are themselves addressing their character. The governments of the adhering countries have recommended the enterprises to observe the principles and standards of good practice.¹⁷ The governments also have undertook the commitment to promote them and encourage their use.¹⁸ However, under the wording of the MNE Guidelines, their observance

¹³ Decision of the Council on the OECD Guidelines for Multinational Enterprises, 27 June 2000, C(2000)96/FINAL. I. National Contact Points, p. 1.

¹⁴ Ibid. Procedural Guidance, I. National Contact Points, A. Institutional Arrangements.

¹⁵ Ibid. Procedural Guidance, I. National Contact Points, C. Implementation in Specific Instances.

¹⁶ Guidelines for Multinational Enterprises, Declaration on International Investment and Multinational Enterprises, Annex 1, 21 June 1976 – C(76)99/FINAL, Amended on 13 June 1979 – C(79)102/FINAL, 17 May 1984 - C/M(87)7 Part II(FINAL), Item 111.II c), 4 June 1991 - C/M(91)12/FINAL, Item 111.II c), 27 June 2000 – C/M(2000)17. I. Concepts and Principles, §. 10.

¹⁷ Ibid. I. Concepts and Principles, §. 1.

¹⁸ Ibid. I. Concepts and Principles, §. 10.

by companies is not legally enforceable and the enterprises have been observing them only on voluntary base.¹⁹

Their voluntary character without legally binding force is reaffirmed vigorously by the NCPs in their final statements concluding the specific instances.²⁰ The NCPs also stress that they can not serve as an investigation or judicial body.²¹ So as a result, the NCP observed that the MNE Guidelines are not the sanction instrument aiming to hold the companies to account.²²

On the other hand, the governments have themselves accepted the obligation to promote the observance of the MNE Guidelines.²³ Thus, the Guidelines primarily create international obligations on the adhered states. But they are not creating the obligations for other entities, especially the companies/enterprises.

WHAT IS THE REALITY?

Contrary to the express wording of the MNE Guidelines, in my opinion, the voluntary character of the MNE Guidelines is not clear. It is true, that the text of the Guidelines is stressing this and also the NCPs are referring to the Guidelines as a voluntary principles. On the other hand, anybody (private person, NGO or trade union) can file a complain and 'blame' any company for the violation of the Guidelines.²⁴ The complaints are not allowed only against the companies accepting the voluntary obligations of the Guidelines.

¹⁹ Ibid. I. Concepts and Principles, §. 1. Preface, §. 1.

²⁰ e.g. Complaint from RAID against DAS Air [online]. [cit. 2011-05-15] UK NCP: London, June 2008. Availabe at: <<http://www.bis.gov.uk/files/file47346.doc>>. §2,3. Complaint from Global Witness against Afrimex (UK) Ltd. [online]. [cit. 2011-05-15] UK NCP: London, August 2008. Availabe at: <<http://www.bis.gov.uk/files/file47555.doc>>. §1,2.

²¹ FoE US & RAID vs. Cabot Corporation, Letter of NCP of United States of America [online]. [cit. 2011-05-15] 23 August 2004. Availabe at: <http://oecdwatch.org/cases/Case_45/224/at_download/file>.

²² Allegations against Avient. [online]. [cit. 2011-05-15] UK NCP: London, 2004. Availabe at: <<http://www.bis.gov.uk/files/file47356.pdf>>.

²³ Guidelines for Multinational Enterprises, Declaration on International Investment and Multinational Enterprises, Annex 1, 21 June 1976 – C(76)99/FINAL, Amended on 13 June 1979 – C(79)102/FINAL, 17 May 1984 - C/M(87)7 Part II(FINAL), Item 111.II c), 4 June 1991 - C/M(91)12/FINAL, Item 111.II c), 27 June 2000 – C/M(2000)17. I. Concepts and Principles, p. 10. Complaint from Global Witness against Afrimex (UK) Ltd. [online]. [cit. 2011-05-15] UK NCP: London, August 2008. Availabe at: <<http://www.bis.gov.uk/files/file47555.doc>>. § 3.

²⁴ Allegations against Oryx Natural Sesources [online]. [cit. 2011-05-15] UK NCP: London, June 2005. Availabe at: <<http://www.bis.gov.uk/files/file47359.pdf>>. Annex 1, § 2.

It is enough that that the company is operating from the territory of the adhering state.

The MNE Guidelines have been also addressed in the works of the United Nations dealing with the involvement of the private enterprises in the Democratic Republic of Congo. The private companies, especially from the OECD Member States, have had strong economic interests in the Great Lakes region, especially aimed to get portion of the rich natural resources of the DRC. And they tent to pursue their business irrespective of the local political situation – whether the region is controlled by the legitimate government or the rebels. The UN established Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo.

²⁵ This Panel observed that the ongoing conflict has been possible also due to the funding of the rebel groups provided by the enterprises seeking access to the minerals.²⁶ In its subsequent report from October 2002 this Panel listed 85 companies from OECD Member States that according the Panel's view violated MNE Guidelines.²⁷ Thus, at least implicitly, this Panel held the view, that the MNE Guidelines have been binding on the companies to be able to observe that they have violated them.

These implications resulted in the further work of the NCPs of various adhering countries. The NCPs then dealt with the implications through the specific instance process.²⁸

To stimulate the process of specific instances, also the Security Council in its resolution 1457(2003) *inter alia* requested the Panel to provide the NCPs with the information it gathered during its work.²⁹

From these facts, especially the referral in the works of the United Nations, it can be derived that the MNE Guidelines have some binding force. This

²⁵ Security Council presidential statement dated 2 June 2000 (S/PRST/2000/20).

²⁶ Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo S/2002/1146 [online]. [cit. 2011-05-15] UN, 16 October 2002. Available at: <<http://www.un.org/News/dh/latest/drcongo.htm>>. §213.

²⁷ Ibid. Annex 3.

²⁸ Illegal Exploitation of Natural Resources in the Democratic Republic of Congo: Public Statement by CIME [online]. [cit. 2011-05-15] Paris: OECD, 12 February 2004. Available at: <http://www.oecd.org/document/6/0,3746,en_2649_34889_27217798_1_1_1_1,00&&en-USS_01DBC.html>.

²⁹ SC Res. 1457(2003). § 14.

view was expressed e.g. by Mr. Nicola Bonucci, Director for Legal Affairs of OECD.³⁰

Additionally, there are economical and social sanctions that are making the MNE Guidelines less voluntary and much more binding on the companies. The other private entities, like banks, can qualify their loans by the observance of the MNE Guidelines. On the other hand, the negative finding of the NCP in the specific instance procedures can have negative impact on the credit of the enterprise. Also the pressure of the NGOs can be significant. These are the effects that do not have much in common with the legally binding character of the MNE Guidelines. But they just illustrate the power connected with so called voluntary principles.

WHAT CAN THE FUTURE BE ?

As was showed in the previous part, the MNE Guidelines are not so voluntary and non-binding as it is claimed in their text. To the contrary, they have more and more binding nature. And this character can be enforced much more during the current process of updating the MNE Guidelines.

There are proposals called for states to connect with the negative findings of the NCPs also the negative consequences on the companies in the access for the public support or public services. These are the calls to limit the companies for access to the export or investment assistance of the governments.³¹ “As matters now stand, even where an NCP finds an egregious violation, under many current arrangements the company remains eligible to receive various forms of public advantage (such as export credit and investment insurance), without any conditions being imposed on it. Ignoring such breaches entirely may well contravene states’ own obligation to encourage companies to comply with the Guidelines. And by implicitly rewarding companies that do the wrong thing it disadvantages those that play by the rules.”³²

³⁰ He referred to the binding nature of the MNE Guidelines at the 2011 Jessup Cup World Champions Round in Washington in March 2011 at the discussion with the participants with the authors of this year compromise.

³¹ RUGGIE, J. Discussion Paper on updating the OECD Guidelines for Multinational Enterprises. 10th OECD Roundtable on Corporate Responsibility [online]. Paris: OECD, 2010 [cit. 2011-05-15]. Available at: <<http://www.oecd.org/dataoecd/17/35/45545887.pdf>>. § 7.

³² RUGGIE, J. Remarks at OECD Investment Committee [online]. Paris: OECD, 4 October 2010 [cit. 2011-05-15]. Available at: <<http://www.reports-and-materials.org/Ruggie-remarks-to-OECD-Investment-Committee-4-Oct-2010.pdf>>. p. 6-7.

CREATING OBLIGATIONS THROUGH BACK DOORS

I do not challenge the presumption that when the governments accepted the obligation to promote the MNE Guidelines they should do as much as they can to do so. But they can not contravene the standard procedure of imposing the obligations on the addresses of the law.

The governments have many other possibilities how they can honour they obligations under the international law. Firstly, the promotion of the MNE Guidelines is the basic one. Governmental offices can hold seminars or workshops to encourage the companies to observe these principles. Secondly, the states still have the ownership interests in several enterprises. So the representatives of the state as shareholder can insist on the observance of these principles form inside the company. This will be in accordance with the voluntary character of the MNE Guidelines when the company itself accepts the principles.

However, the creation of the system of state offices (the NCPs) which can observe the application of the MNE Guidelines and at the end of the day even find the company in violation of them, is stretching to much over the voluntary and not legally binding character of the principles. Moreover, if the states connect the findings of NCP (which can be made without the consent of the enterprise involved) with the public assistance to the company, this will make the legal norm complete by adding the real sanction affecting the enterprise.

If the states wish so much their enterprises to observe the corporate social responsibility (which is desirable), they should pursue this aim through the classical legal way of creating the legal obligations. Firstly, if they wish to do so in international level, the drafting of the international agreement which will directly imposing the rights and obligations (self-executing treaty) is the proper way. Such an agreement will then have to pass the scrutiny of the national legislators which are the only legitimate creators of the binding legal norms on private entities. This process will ensure the legal certainty for the corporations which will not exactly that there are obligations for them to observe and that they are connected with certain sanctions. Additionally, this will ensure the homogeneity of the obligations all over the adhering states.

Further, the states have themselves other possible way. If they want to keep only the obligation to promote the observance of MNE Guidelines for themselves, as it is the current state, then they again have the possibility to use the domestic legislation procedures. They can pass the laws incorporating the MNE Guidelines principles into their domestic legislation. This gain will ensure the legal certainty for the subjects of the law. Only drawback in this scenario is the lack of unity among the states in the content of the obligations and the sanctions connected to their violations.

CONCLUSION

The enterprises pursuing their businesses round the world are affecting the whole society. Thus, the concepts corporate social responsibility are gaining more and more importance addressing these side effects of the international business. As the OECD is the source of the greatest portion of internationally operating corporations, it is not surprise that the OECD is very active in this field. The MNE Guidelines are clear example how the OECD has been pursuing the convergence between the business aims and the ethical standards.

In general, the corporate responsibility principles are formulated as voluntary steps that the enterprise should follow. But the establishment of the governmental level of observance in the case of MNE Guidelines – the National Contact Points, has been swinging this characteristic more and more to the legally binding rules. This trend is not in itself negative. However, the procedure employed by the OECD Member States is worrying. Instead of drafting the clear binding rules that have passed the standard legislative process and have been endorsed by the appropriate legislative bodies, the MNE Guidelines are changing their character in rather creeping way through back doors. To conclude, I would like to “remind states that they are the primary human rights duty bearers under international law —that corporate responsibility is not a substitute for effective state policies, regulation and adjudication.”³³

LITERATURE

Allegations against Avient. [online]. [cit. 2011-05-15] UK NCP: London, 2004. Available at: <<http://www.bis.gov.uk/files/file47356.pdf>>.

Allegations against Oryx Natural Resources [online]. [cit. 2011-05-15] UK NCP: London, June 2005. Available at: <<http://www.bis.gov.uk/files/file47359.pdf>>.

Complaint from Global Witness against Afrimex (UK) Ltd. [online]. [cit. 2011-05-15] UK NCP: London, August 2008. Available at: <<http://www.bis.gov.uk/files/file47555.doc>>.

Complaint from RAID against DAS Air [online]. [cit. 2011-05-15] UK NCP: London, June 2008. Available at: <<http://www.bis.gov.uk/files/file47346.doc>>.

Convention on the Organisation for Economic Co-operation and Development.

Decision of the Council on the OECD Guidelines for Multinational Enterprises, 27 June 2000, C(2000)96/FINAL.

Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo S/2002/1146 [online]. [cit. 2011-05-15] UN, 16 October 2002. Available at: <<http://www.un.org/News/dh/latest/drcongo.htm>>.

³³ Ibid. p. 4.

FoE US & RAID vs. Cabot Corporation, Letter of NCP of United States of America [online]. [cit. 2011-05-15] 23 August 2004 Available at: <http://oecdwatch.org/cases/Case_45/224/at_download/file>.

Guidelines for Multinational Enterprises, Declaration on International Investment and Multinational Enterprises, Annex 1, 21 June 1976 – C(76)99/FINAL, Amended on 13 June 1979 – C(79)102/FINAL, 17 May 1984 - C/M(87)7 Part II(FINAL), Item 111.II c), 4 June 1991 - C/M(91)12/FINAL, Item 111.II c), 27 June 2000 – C/M(2000)17.

Illegal Exploitation of Natural Resources in the Democratic Republic of Congo: Public Statement by CIME [online]. [cit. 2011-05-15] Paris: OECD, 12 February 2004. Available at: <http://www.oecd.org/document/6/0,3746,en_2649_34889_27217798_1_1_1_1,00&&en-USS_01DBC.html>.

OECD Declaration and Decisions on International Investment and Multinational Enterprises [online]. Paris: OECD, [cit. 2011-05-15]. Available at: <www.oecd.org/daf/investment/declaration>.

RUGGIE, J. Discussion Paper on updating the OECD Guidelines for Multinational Enterprises. 10th OECD Roundtable on Corporate Responsibility [online]. Paris: OECD, 2010 [cit. 2011-05-15]. Available at: <<http://www.oecd.org/dataoecd/17/35/45545887.pdf>>.

RUGGIE, J. Remarks at OECD Investment Committee [online]. Paris: OECD, 4 October 2010 [cit. 2011-05-15]. Available at: <<http://www.reports-and-materials.org/Ruggie-remarks-to-OECD-Investment-Committee-4-Oct-2010.pdf>>. p. 6-7.

SC Res. 1457(2003).

Security Council presidential statement dated 2 June 2000 (S/PRST/2000/20).

Terms of Reference for an update of the Guidelines [online]. Paris: OECD, 30 April 2010. Available at: <<http://www.oecd.org/dataoecd/61/41/45124171.pdf>>

The OECD Declaration and Decisions on International Investment and Multinational Enterprises: basic Texts. DAF/IME(2000)20.

The OECD Guidelines for Multinational Enterprises: Frequently Asked Questions [online]. Paris: OECD, [cit. 2011-05-15]. Available at: <http://www.oecd.org/document/58/0,3746,en_2649_34889_2349370_1_1_1_1,00.html>.

Updating the OECD Guidelines for Multinational Enterprises [online]. Paris: OECD, 29 April 2011 [cit. 2011-05-15]. Available at: <http://www.oecd.org/document/33/0,3746,en_2649_34889_44086753_1_1_1_1,00.html>.

Contact – email

cisar.ivan@gmail.com